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Supreme Court, U.S.
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No. 94-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN, and DONALD DOSSETT,
Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner Owens-Corning Fiberglas Corporation has waived and/or failed to preserve the arguments raised in its Petition that the punitive damages awards in three of these four cases are so grossly excessive as to violate due process.

2. Whether Illinois law with regard to punitive damages, as applied to this case, including the provision that the jury may consider evidence that defendant might be subject to multiple awards for the same misconduct, is consistent with the requirements of due process.

3. Whether there is no constitutional prohibition against compelling a corporation, over which the state court has jurisdiction, to produce officers, directors and/or employees, over whom the court has no jurisdiction, to testify at trial, where the witnesses themselves are not subject to sanction or contempt for failing to appear.

PARTIES

Petitioner Owens-Corning Fiberglas Corporation is a publicly held corporation.

Respondent M. Oveta Pickering is an individual and administrator of the estate of Arvel Pickering, deceased.

Respondents, Charles Anderson, Carl Osterman and Donald Dossett, are individuals.

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v.

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On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Owens-Corning Fiberglas Corporation.

OPINION BELOW

These consolidated cases were brought in the Circuit Court for the Third Judicial Circuit of Madison County, Illinois. The opinion of the Illinois Appellate Court, Fifth District, was filed May 3, 1994 and is reported at 265 Ill.App.3d 806, 638 N.E.2d 1127 (5th Dist. 1994) [1a-30a].[1] The Appellate Court granted Owens-Corning Fiberglas Corporation's ("OCF") petition for rehearing and allowed it to supplement the Record on Appeal by filing the trial transcript [31a-32a]. After reviewing the transcript, by Order dated August 26, 1994, the Appellate Court ruled that its Opinion would stand as filed [33a-34a]. By Order dated December 6, 1994, the Supreme Court of Illinois denied OCF's Petition for Leave to Appeal which is reported at 158 Ill.2d 583 (1994) [69a]. Subsequently, in unreported orders, the Supreme Court of Illinois denied rehearing or reconsideration [70a-73a].

CONSTITUTIONAL PROVISION AND STATE SUPREME COURT RULE INVOLVED

United States Constitution, Amendment Fourteen, in pertinent part: "No State shall . . . deprive any person of life, liberty or property, without due process of law."

Illinois Supreme Court Rule 237(b), in pertinent part: "The appearance at trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. If the

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[1] Citations to the Appendix are to the Petitioner's Appendix to the Petition for a Writ of Certiorari.

party or person is a nonresident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses.

STATEMENT OF THE CASE

The four consolidated cases, which are the subject of OCF's Petition, involve personal injury, illness and death resulting from exposure to asbestos from Kaylo, an insulation product manufactured, sold and distributed by OCF. As a result of their exposure, Arvel Pickering, Carl Osterman, Donald Dossett and Charles Anderson contracted asbestosis. Mr. Pickering died from asbestosis. At the time of this exposure, OCF knew that asbestos posed a hazard to human health. Yet, it deliberately, and with wanton disregard for the safety of these men and other workers, manufactured and marketed asbestos-containing insulation.

Trial began in these cases on March 3, 1992, in the Circuit Court for Madison County, Illinois. Plaintiffs, pursuant to Ill.S.Ct. Rule 237(b), served OCF with notices to produce four corporate officers to testify at trial. OCF moved to quash the notices, asserting that it was unconstitutional to compel OCF to produce corporate witnesses over whom the court had no personal jurisdiction. OCF also asserted, as a matter of state law, that the notices were burdensome and harassing. In support of its motion, OCF submitted affidavits from the four individuals setting forth facts concerning only personal jurisdiction. OCF submitted no evidence in support of its state law arguments. The four individuals entered a special appearance, through separate counsel, and filed

their own motion to quash the notices on constitutional grounds. Both motions to quash were denied.[2]

OCF then sought extraordinary relief in both state and federal court.[3] When this relief was denied, OCF refused to comply with the order that it produce the witnesses. By Order dated March 17, 1992, the trial court found that OCF's refusal to comply was "deliberate and in complete disregard of the Court's authority" [40a]. Accordingly, the trial court imposed sanctions against OCF. OCF's pleadings were stricken, and it was not permitted to introduce evidence or cross-examine witnesses with regard to liability issues. It was not permitted to present any evidence through corporate witnesses, but could otherwise contest all damage issues, *including punitive damages*. As a safeguard, Plaintiffs were required to present a *prima facie* case on the liability issues, and it was only after they had done so that any default was entered against OCF.

OCF was *not*, as it claims in its Petition, defaulted on the issue of punitive damages. The March 17, 1995 Order expressly states, "that [OCF] may cross-examine Plaintiffs' witnesses and present evidence on all damage issues, both compensatory and punitive" [41a]. The Order entering a default, dated March 31, 1992, states that

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[2] The individuals never appealed from the denial of their separate motion to quash.

[3] OCF sought, and was denied, federal injunctive relief. *see Owens-Corning Fiberglas Corp. v. Moran*, 789 F.Supp. 286 (S.D. Ill.), *aff'd* 959 F.2d 634 (7th Cir. 1992). OCF was even cautioned, in the panel opinion authored by Judge Easterbrook, that there could be costs to placing exclusive reliance upon a questionable legal position and being wrong. *See* 959 F.2d at 636.

"because awarding punitive damages is discretionary with the jury even if wilful and wanton misconduct is proved, [OCF] may present evidence on the issue of whether its conduct was wilful and wanton" [47a-48a]. The punitive damages instructions also advised the jury that it was to decide whether or not to award punitive damages, and not merely what amount to award.[4]

The trial court also sanctioned OCF for refusing to comply with Plaintiffs' discovery requests concerning its financial status [49a]. OCF claimed to have a negative net worth, despite a market capitalization (number of outstanding shares times market price per share) of $1.5 billion. Because OCF refused to produce necessary information, the court, as a sanction, instructed the jury that OCF's net worth was $1.5 billion.

OCF objected to Plaintiffs' tendered instructions on punitive damages, but did not tender any punitive damages instruction of its own. At trial, OCF offered no evidence concerning the fact or possibility of multiple punitive damage awards against it in asbestos cases. OCF attempted, post-trial, to offer such evidence in the form of an affidavit.[5] The trial court properly refused to consider

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[4] The first instruction stated, in pertinent part, "if you believe that justice and the public good require it, you *may*, in addition to any damages to which you find such Plaintiff or Plaintiffs entitled, award [punitive damages]" [51a] (*emphasis added*). The second instruction advised the jury that it could consider OCF's net worth "in determining what, *if any*, amount of punitive damages would be sufficient" [51a] (*emphasis added*).

[5] The affidavit, interestingly enough, was from Robert McOmber, one of the four witnesses whom OCF refused to produce at trial in response to plaintiffs' Rule 237(b) notice. OCF

(continued...)

information which had not been offered as evidence at trial.

OCF's post-trial motion and appeal raised the following constitutional challenges to the punitive damages awards: that the jury instructions were inadequate; that post-verdict review was insufficient; and that the awards were substantively excessive, in that they were disproportionate to the compensatory damages and failed to reflect the prospect of multiple awards for the same misconduct. OCF did not appeal the punitive damages awards on any state-law ground, including excessiveness. OCF also asserted, in its post-trial motion and on appeal, that it was unconstitutional to compel OCF to produce the four witnesses under Rule 237(b). OCF *never* argued to any court below—that the imposition of any sanction, including the instruction that its net worth was $1.5 billion, was itself unconstitutional; or that any sanction, including the instruction that its net worth was $1.5 billion, rendered the punitive damages awards unconstitutional.

REASONS FOR DENYING THE WRIT

Respondents respectfully submit, that OCF's Petition should be denied as to both questions raised. OCF has, in the past, sought and been denied certiorari on *precisely* these same two issues. *See Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill.App.3d 781, 610 N.E.2d 683 (5th Dist.), *app. denied*; 152 Ill.2d 561, 622, N.E.2d 1208

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[5] (...continued)
had previously argued that McOmber had no knowledge relevant to the cases. Apparently, that was inaccurate.

(1993), *cert. denied*, 114 S.Ct. 1219 (1994) (refusing to consider identical constitutional challenge to award of punitive damages against OCF in asbestos case); *Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill.App.3d 425, 599 N.E.2d 129 (4th Dist.), *app. denied*, 147 Ill.2d 627, 606 N.E.2d 1227 (1992), *cert. denied*, 113 S.Ct. 2335 (1993) (refusing to accept constitutional challenge to Ill. S.Ct. Rule 237(b) in asbestos case). These issues are no more worthy of certiorari at this time, than they previously were in *Kochan* and *Johnson*.

Many of the arguments and issues, upon which OCF relies here, were waived or never presented below. Due to OCF's choice of trial tactics, this case is a procedural quagmire. OCF's repeated and deliberate refusal to obey court orders renders it impossible for this Court to even reach the issues raised by OCF in its Petition, without also deciding (or ignoring) several procedural issues which have no federal or constitutional significance.

I.

There Is No Colorable Challenge To The Constitutionality Of The Punitive Damages Awards

OCF's punitive damages position is replete with waiver and procedural defaults in the courts below. It attempts to raise new arguments, which were not presented to the courts below, in a transparent effort to make this case appear to be in line with *BMW of North America v. Gore*, 115 S.Ct. 932 (1995)—which it is not. OCF's arguments below were "identical" to those presented and rejected in *Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill.App.3d 781, 610 N.E.2d 683 (5th Dist.), *app. denied*, 152 Ill.2d 561, 622 N.E.2d 1208 (1993), *cert. denied*, 114 S.Ct. 1219

(1994). *See App. Ct. Op.*, at 23a ("[OCF] presented an identical argument to this court in [*Kochan*], where we rejected it, as we reject here"). This Court tacitly rejected those arguments by denying certiorari in *Kochan*, after having expressly rejected most of them in *TXO Production Corp. v. Alliance Resources*, 113 S.Ct. 2711 (1993). Respondents request that this Court do the same here.

A. Certiorari Is Inappropriate Because OCF Has Waived Or Not Preserved Any Constitutional Error Relating to Punitive Damages

This Court will not review "a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground." *Sochor v. Florida*, 112 S.Ct. 2114, 2119 (1992) (failure to object to jury instruction precluded review). In the case at bar, the Appellate Court held, that OCF waived any error in the jury instruction on punitive damages by failing to tender an instruction of its own. *App.Ct. Op.*, at 23a-24a. Under *Deal v. Byford*, 127 Ill.2d 192, 537 N.E.2d 267, 271 (1989), which is cited below, the failure to tender an instruction waives *any* error in the punitive damages awards. There is, thus, "an adequate and independent state ground" for upholding the judgments—namely, waiver—and certiorari should be denied.

OCF offered no evidence at trial concerning its potential or actual exposure to multiple punitive damages awards in asbestos cases, although Illinois law expressly permits it to have done so. *See Kochan*, 610 N.E.2d at 828 (exposure to multiple punitive damages awards is a valid consideration, but defendant must present evidence to the jury). That failure constitutes another independent state-law ground for affirming the judgments, particular-

ly with regard to the issue of possible multiple awards, an issue in *BMW*.

Certiorari should also be denied because OCF by-passed state-court procedures, which it now argues led to a substantively unconstitutional result. *See Yee v. City of Escondido, Calf.*, 112 S.Ct. 1522, 1528-29 (1992) (declining to review constitutionality of procedure which petitioner by-passed). *See also TXO*, 113 S.Ct. at 2720 (if procedures are fair, there is a "strong presumption" that the judgment is valid). OCF offered no evidence relating to multiple awards and, also, asserted only constitutional errors with regard to punitive damages on appeal. Under Illinois law, evidence relating to multiple awards is admissible. An appellate court can reverse an excessive award of punitive damages or order a remitter, if it is the result of bias, passion or prejudice. *See Kochan*, 610 N.E.2d at 826-27.

In *Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994), this Court held, that state courts were required to provide meaningful, substantive review of punitive damage awards. Both the majority and the dissenters, in *Honda Motors*, essentially agreed that the validity of a punitive damages award depends upon the fairness of the process as a whole, rather than any one aspect of the process. OCF's failure to utilize the whole process available under Illinois law—particularly appellate review—should, in these circumstances, preclude review by this Court.

Given these procedural defaults, it is unnecessary to retain this case pending a decision in *BMW*, because that decision will not affect these judgments. *See Coleman v. Thompson*, 111 S.Ct. 2546, 2554 (1991) ("if resolution of a federal question cannot affect the judgment, there is

nothing for [this] Court to do"). A remand in light of *BMW*, even on the issue of multiple awards, would not affect the judgements because OCF failed to offer evidence on that issue. Regardless of how *BMW* is decided, this case would be reaffirmed on that state-law ground.

In a desperate attempt to bring this case within the ambit of *BMW*, OCF has improperly raised new arguments which it never presented below. Such attempts should be rejected. *See Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (declining to consider constitutional challenges to punitive damages not raised below). OCF did not claim, below, that the punitive damages awards were unconstitutional because there was an excessive focus on evidence of wealth. *See* OCF Post-Trial Motion, ¶46, N at 63a (affirmatively arguing that financial status is necessary consideration). OCF also made no argument, below, that the punitive damages awards in this case should be compared to awards in similar cases, particularly to other asbestos judgments against OCF.

OCF's only *real* complaint with regard to financial status, was the manner in which it was determined—as a sanction for discovery violations with regard to financial information. That sanction involves a purely state-law issue over which this Court has no jurisdiction. *See International Longshoremen's Assoc. AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). Indeed, in *TXO*, this Court merely noted that the defendant's financial status had been determined by a discovery sanction. *See* 113 S.Ct. at 2716, n.9. OCF offered no evidence below in support of the claim that this "is both the largest total and the largest per capita judgment ever upheld against [OCF] after appeal in an asbestos case." *See* Petition, p.18. Its anecdotal references here to reported cases are unavail-

ing, given that OCF did not cite them to any court below. In any event, both of these arguments were rejected by this Court in *TXO*, 113 S.Ct. at 2723 (financial status may be considered), and at 2720 (comparison to other awards not required).

Additionally, OCF now suggests, that the sanctions imposed against it for disobeying court orders somehow render the punitive damages awards unconstitutional. OCF was *not* defaulted on punitive damages. OCF never argued that any sanction imposed against it was unconstitutional, or that any sanction rendered punitive damages unconstitutional. That includes the sanction, imposed for discovery violations, under which the jury was instructed that OCF's net worth was $1.5 billion. These are purely state-law issues, as to which no constitutional issue was raised and over which this Court has no jurisdiction. *See International Longshoremen*, 476 U.S. at 387; *Bankers Life*, 486 U.S. at 77.

B. Illinois Punitive Damages Law, As Applied In The Case At Bar, Comports With Due Process

This Court has declined to find any procedural infirmity in an award of punitive damages, where "traditional common law procedures were followed." *Honda Motors*, 113 S.Ct. at 2726 (Scalia, J., *concurring*). Indeed, the reversal of the award in *Honda Motors* was compelled by the *failure* to provide a traditional procedure. Illinois law not only provides all traditional procedures, it includes additional pre-trial protections under 735 ILCS 5/2-604.1 (requiring preliminary hearing on issue of punitive damages). *See Kochan*, 610 N.E.2d at 827; *Hazelwood v. Illinois Central Gulf R.R.*, 114 Ill.App.3d 703, 450 N.E.2d 1199 (4th Dist. 1983). OCF's challenges to the punitive

damages awards proceed from a misreading of this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), which was ultimately clarified in *TXO*, 113 S.Ct. 2711. Illinois law, as applied here, is consistent with *TXO*, and further review of these issues by this Court is unwarranted.

OCF's two arguments that the awards are substantially excessive, are equally meritless. This Court has never imposed a specific proportionality requirement. It did not do so in *Haslip*. *See* App.Ct. Op. at 25a-26a. As OCF acknowledges, this Court upheld a punitive damages award which was 526 times the compensatory damages in *TXO*. Indeed, *TXO* removes any suggestion, that due process compels some arbitrary mathematical ratio, and directs attention to the potential harm which could have resulted from the defendant's misconduct.[6] Regardless of whether or not it is compelled by due process, Illinois law already holds that the prospect of multiple punitive damages awards for the same misconduct is a valid consideration. It would be superfluous and advisory for this Court to grant certiorari, for the purpose of deciding whether or not due process requires what Illinois law already provides. Moreover, due to OCF's failure to offer admissible evidence on this issue at trial, the record here does not support consideration of this issue.

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[6] *TXO*, also, correctly notes that compensatory damages may not always reflect potential harm. Given the compensatory damages award of $2.8 million in *Pickering* (where punitive damages were unavailable), the punitive damages awards of $2.5 million in each of the other three cases arguably bear *less* than a 1-to-1 ratio to the *potential* harm which could result from exposure to asbestos.

II.

Ill.S.Ct. Rule 237(b) Is Not Unconstitutional

OCF's constitutional challenge to Ill.S.Ct. Rule 237(b) borders on the frivolous. Illinois courts have consistently held that it is permissible, under Rule 237(b), to compel a corporation, over which the court has jurisdiction, to produce witnesses who, as individuals, are beyond the power of the court. *See Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill.App.3d 425, 599 N.E.2d 129 (4th Dist.), *app. denied*, 147 Ill.2d 627, 606 N.E.2d 1227 (1992), *cert. denied*, 113 S.Ct. 2335 (1993); *Oakview New Lenox Sch. Dist. v. Ford Motor Co.*, 61 Ill.App.3d 194, 378 N.E.2d 544, 547 (3rd Dist. 1978); *Soto v. E.W. Bliss Div. of Gulf & Western Mfg.*, 116 Ill.App.3d 880, 452 N.E.2d 572, 579 (1st Dist. 1983). In *Johnson v. OCF*, this Court denied certiorari on the very same constitutional issue OCF is attempting to present here. The United States Court of Appeals, Seventh Circuit, affirmed the denial of a federal injunction against the application of Rule 237(b) in this case, and admonished OCF for its blind adherence to a questionable constitutional argument. *See OCF v. Moran*, 959 F.2d 634, 636 (7th Cir. 1992).

The fatal flaw in OCF's position, then and now, is its inability to identify the specific right, which is supposedly being violated—or even to whom that right belongs. The rights of the individual witnesses are not at issue, because they were not subject to any sanction or deprivation. They did not even appeal here. OCF, itself, is subject to jurisdiction and can be compelled to act through its agents.

Due process, by the terms of the fourteenth amendment, protects against arbitrary or unfair deprivations. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). The prohibition against being hailed into a distant jurisdiction, upon which OCF relies, springs from the potential deprivation which might be occasioned by the entry of a judgment. Similarly, holding a witness in contempt for failing to appear directly impairs a protected individual interest. Illinois law expressly protects the individual interests of those named in a Rule 237(b) notice. Those individuals cannot be held in contempt *personally* for failing to appear. *See Salvator v. Admiral Merchants Motor Freight*, 175 Ill.App.3d 901, 503 N.E.2d 639 (4th Dist. 1988). Similarly, Illinois law holds that courts cannot acquire jurisdiction over a non-resident individual solely because of his position with a corporation, which is subject to jurisdiction. *See People ex rel. Hartigan v. Kennedy*, 215 Ill.App.3d 880, 576 N.E.2d 107 (1st Dist. 1991).[7] In the cases at bar, the trial court acknowledged that it had no jurisdiction over the individuals, and stated that no adverse consequences of any kind would befall them.

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[7] OCF's suggestion, that it is but a short step from Rule 237(b) to allowing courts to compel a corporation to force employees to submit to jurisdiction, is a classic "slippery slope" fallacy. The possibility, that an otherwise legitimate power might be abused, does not render that power unconstitutional. It is, moreover, an insult to the integrity of the state courts to suggest that they cannot differentiate between the constitutional and unconstitutional. No doubt, the Illinois courts will continue to do what they have been doing—insure that the power of the courts under Rule 237(b) is directed to the corporation, not the individuals.

Because there is no violation of the individuals' rights, OCF's protracted discourse on state-action is irrelevant. State-action is a necessary element of a fourteenth amendment claim, but it is not sufficient by itself to sustain one. States can compel parties to a lawsuit to produce evidence, and nothing cited by OCF is to the contrary.

With regard to its own rights, OCF relies primarily upon the possibility that Rule 237(b) could be used to harass or burden large corporations. OCF cites no authority suggesting that this, or any other concern directly involving OCF, is protected by the Constitution. Such concerns reflect matters involving only state law. *See Longshoremen v. Davis*, 476 U.S. at 387 (no jurisdiction over state-law matters). In reality, Illinois law does prohibit using Rule 237(b) as a tool for harassment, and provides that a notice may be quashed upon a showing of the same. *See Soto*, 452 N.E.2d at 579; *Oakview*, 378 N.E.2d at 548. In the case at bar, OCF declined to submit any evidence on this issue and, therefore, failed to carry its burden. Once again, OCF is attempting to challenge the constitutionality of a state procedure, without having availed itself of the protections accorded it under Illinois law. It should not be permitted to do so. *See Yee*, 112 S.Ct. at 1528-29.

It is surely not the province of this Court to review every vague assertion of unfairness, such as OCF raises here. The real issue, is whether a corporation, as an artificial entity, can be compelled to act through the natural persons who are its agents. This Court has consistently recognized a legal difference between a person's acting in a corporate capacity, as opposed to an individual capacity, and held that individuals may be required to act on

behalf of a corporation, even where individual rights are threatened. *See Commodity Futures Trading Comm. v. Weintraub*, 471 U.S.343 (1985) (compelling corporate attorney to disclose privileged communications, despite officers' claims of individual privilege); *Bellis v. United States*, 417 U.S. 85 (1974) (custodian of records may be required to produce documents, even if doing so threatens individual protection against self-incrimination). Compelling a corporation to produce corporate witnesses to testify at trial is consistent with these authorities, and does not offend due process.

CONCLUSION

OCF wantonly poisoned four men (along with others) by marketing a product which it knew to be toxic. OCF employed trial tactics which involved filing numerous requests for extraordinary relief, including federal injunctions, and deliberately disobeying court orders. OCF neglected some basic matters, such as tendering jury instructions and preserving issues on appeal. OCF by-passed procedures, which it now claims led to unfair results. There is no clean, colorable constitutional issue for review. There is only the final plea of a disgruntled litigant, which decided, from the outset, to cry foul, rather than to play fair.

Accordingly, and for the reasons stated herein, Respondents respectfully request that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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